NO. 82-1040

In the Supreme Court of the United States

OCTOBER TERM, 1982

ARVIS E. WHITMAN, SHERIFF
BIENVILLE PARISH, LOUISIANA,

PLAINTIFF-APPELLEE

V.

NORTH RIVER INSURANCE COMPANY,

DEFENDANT-APPELLANT

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHARLES L. MAYER
Mayer, Smith & Roberts
1700 Buckner Square, Suite 240
Shreveport, Louisiana 71101
Telephone: (318) 222-2135
Attorneys for Defendant-Appellant

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED FOR REVIEW

1. Do the terms specifying liability coverage in the policy of insurance, written by appellant, North River Insurance Company, obligate it to pay damages assessed against its insured, Sheriff Arvis E. Whitman, due to an unprovoked assault and battery upon a person in his custody.

LIST OF ALL PARTIES

All parties to this case appear in the caption of the case before the Court. Gray & Company, Inc., although not a party to these proceedings, has an interest in the outcome of this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ARVIS E. WHITMAN, SHERIFF,
BIENVILLE PARISH, LOUISIANA,

PLAINTIFF-APPELLEE

V.

NORTH RIVER INSURANCE COMPANY,

DEFENDANT-APPELLANT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, North River Insurance Company, respectfully prays that a writ of certiorari issue to review the per curiam Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 15, 1982.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit Court rendered no opinion in affirming the judgment of the trial court. (App. A, infra) The Opinion of the United States District Court, Western District of Louisiana, Shreveport, Division, (App. B, infra) is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 15, 1982. (App. A, infra, A-1) This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:1332. Diversity of citizenship; amount in controversy; costs:

> (a) The District Courts shall have original jurisdiction in all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or a subject of a foreign state;
>
> (3) citizens of different states and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or different States.
>
> (b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff

or counter-claim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445

STATEMENT OF THE CASE

The incident giving rise to this lawsuit is most succinctly stated by a quotation from a per curiam Opinion rendered by the United States Court of Appeals for the Fifth Circuit:

"In this case, tried to the District Judge without

the intervention of a jury, Reverend Mack Ford was awarded damages against the Sheriff of Bienville Parish, Louisiana, in the sum of $4,000.00 for a physical assault committed by the Sheriff upon Ford in the Sheriff's Office on December 19, 1975. The undisputed evidence established that the Sheriff had caused Ford to be called back to the Sheriff's Office in the Courthouse, after hours, to furnish new bail in a case pending against Ford. He was called into the Sheriff's Office, where the Sheriff questioned Ford about some scandalous remarks which Ford had allegedly made about him and then struck him about the face and head at least three times."

Per Curiam Opinion of Coleman, Fay and Rubin, Circuit Judges in "Mack W. Ford v. Arvis E. Whitman, Sheriff, Bienville Parish", #77-3510 and #79,1006, United States Court of Appeals for the Fifth Circuit, dated August 14, 1979.

On September 3, 1980, Sheriff Arvis E. Whitman filed suit on the docket of the Second Judicial District Court, Parish of Bienville, State of Louisiana, against four insurance companies for the sum of $18,543.75, allegedly the amount of his damages resulting from a judgment rendered against him for the assault and battery on the person of Reverend Mack W. Ford. Of this amount, it was alleged that $7,843.75 was required to pay off the judgment in favor of Mack W. Ford and the balance was allegedly court costs for an appeal to the United States Court of Appeals for the Fifth Circuit and to the United States Supreme Court, together with attorney's fees in the amount of $10,000.00.

The aforesaid suit was removed by the defendant to the United States District Court, Western District of Louisiana, Shreveport Division, based upon 28 U.S.C. 1332(a)(1) and (c). After removal, the insurers filed a motion to dismiss on the grounds of res judicata. Sheriff Whitman filed a motion to oppose the motion to dismiss on grounds of res judicata and attached a copy of the certificate of insurance issued to him. Sheriff Whitman sought indemnity from these companies under the following provisions of his policy:

> "Coverage C—Personal Injury—'Personal injury' means false arrest, erroneous service of civil papers, false imprisonment, malicious prosecution, libel, slander, defamation of character, deprivation of rights (as further defined herein), violation of property rights *and, if committed while making or attempting to make an arrest or while resisting an overt attempt of escape by a person under arrest, assault and battery,* provided that no act shall be deemed to be or result in any personal injury unless committed or alleged to have been committed during the currency of this policy arising out of the performance of the duties under color of law of any duly elected or appointed office of Sheriff or deputy sheriff of any parish of the State of Louisiana is stipulated herein;
>
> 'Deprivation of rights' means only acts committed under color of any statute, ordinance, regulation, custom, or usage, of any state or political subdivision, which subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction to the deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States of America."

While the motion to dismiss was pending, Sheriff Whitman filed an amended complaint and substituted appellant, North River Insurance Company, in the place of the other insurers, and this complaint was allowed by order signed November 5, 1981. (App. C, infra, A-11) The motion to dismiss on the basis of res judicata was declared moot.

North River Insurance Company filed an answer and admitted that it did have a policy covering Arvis E. Whitman but denied that this policy extended coverage to Sheriff Whitman for the damages he allegedly sustained as a result of the judgment rendered against him for the assault and battery on Reverend Mack W. Ford.

On January 8, 1982, Sheriff Whitman filed a motion for summary judgment and attached copies of the complaints, the answer, a memorandum ruling in the suit of "Mack W. Ford v. Arvis E. Whitman", Civil Action #76-1210, United States District Court, Westsern District of Louisiana, Shreveport Division, a copy of the policy of insurance and an affidavit concerning damages. Defendant-appellant filed an opposition to the motion for summary judgment and the matter was heard in the United States District Court, Western District of Louisiana, Shreveport Division, before the Honorable Tom Stagg, Judge of said Court, on March 1, 1982. The Court sustained Sheriff Whitman's motion for summary judgment and on March 11, 1982, the Trial Judge entered a judgment in favor of Arvis E. Whitman and against North River Insurance Company in the amount of $18,543.75. (App. B, infra, A-2)

North River Insurance Company thereafter perfected an appeal to the United States Court of Appeals for the Fifth Circuit before Circuit Judges Rubin, Johnson and Williams. In a per curiam Opinion rendered without oral or written reasons on October 15, 1982, they affirmed the ruling of the lower Court. It is from this judgment that defendant-appellant, North River Insurance Company, has prosecuted an appeal to this Court.

REASONS FOR GRANTING THE WRIT

The result of this case, if not reversed, will give Courts at the Federal and State level, the right to re-write clear and unambiguous insurance policy provisions so that they will cover situations not contemplated by the parties when the contract of insurance was initially agreed upon. By purposely misconstruing the clear meaning of the policy provisions, the Court below holds, that a law enforcement official, merely upon a showing of being insured, may enjoy financial immunity from tort damages resulting from an unprovoked assault and battery on a person of another in his custody.

A contract of insurance, like any other agreement, is the law between the parties. *Calcasieu Marine National Bank, et al v. American Employers' Insurance Company,* (5 Cir., 1976), 533 F.2d 290; *Article 1901, Louisiana Civil Code; Sumrall v. Aetna Casualty and Surety Company,* (La. App. 2nd Cir., 1960) 124 So2d 168; *Schmieder v. State Farm Fire and Casualty Company,* (La. App. 1st Cir., 1976)

339 So2d 390, writ refused 341 So2d 895 (1977).

The lower Courts should have given legal effect to the provisions of the North River Insurance Company policy according to the true intent of the parties, which is determined by the wording of the policy when its provisions are clear and unambiguous. *Calcasieu Marine National Bank, et al v. American Employers' Insurance Company,* Supra; *Bunch v. Frezier,* (La. App. 1st Cir., 1970) 239 So2d 680; *Schmieder v. State Farm Fire and Casualty Company,* Supra.

It is well established in Louisiana that an insurer may limit its liability and, in the absence of ambiguity or conflict with a statute or public policy, this limitation must be given effect. *Muse v. Metropolitan Life Insurance Company,* 193 La. 605, 192 So. 72 (1939); *Cormack v. Prudential Insurance Company of America,* 259 so2d 340, (La. App., 4th Cir., 1972), writ refused 261 La. 824, 261 So2d 230 (1972).

Although ambiguities in the language of an insurance policy are to be resolved against the insurer as the author of the policy, Courts ought not to strain to find such ambiguities, if, in so doing, they defeat probable intentions of the parties even when the result is an apparently harsh consequence to the insured. *Arcement v. Norman Industries, Inc.,* (5th Cir., 1981), 652 F.2d 395; *Calcasieu Marine National Bank, et al v. American Employers' Insurance Company,* Supra.

It is not the task of the Courts to reform or re-write insurance policies on the notion that under all circumstances, irrespective of plain policy provisions, the insured is entitled to indemnity. *St. Paul Fire & Marine Insurance Company v. Vest Transportation,* (5th Cir., 1982), 666 F.2d 932.

Keeping in mind the rules of Louisiana insurance law quoted hereinabove, let us closely examine the contract between the parties, to-wit: North River Insurance Company and Sheriff Whitman (App. D, infra, A-14). We see in Section I the usual language which is substantially reproduced in all liability insurance contracts. In essence, it states that the company will pay on behalf of the insured all sums which he becomes obligated to pay as damages "to which this policy applies" and because of, as provided under Coverage C, a personal injury as defined therein. It states that "personal injury" means, for example, "false arrest". In other words, if a person is falsely arrested, it could be seriously argued that damages which he may have suffered would not necessarily mean injury to the person or personal injury in the general sense of the word. However, in this policy under consideration, personal injury is specifically defined to include the tort of false arrest. The same is true of erroneous service of civil papers, false imprisonment, malicious prosecution, libel, slander, defamation of character and deprivation of rights, as further defined. *The policy goes on to state that it covers assault and battery, but it qualifies assault and battery by stating that "personal injury" means assault and battery if committed*

while making or attempting to make an arrest or while resisting an overt attempt to escape by a person under arrest.

We submit there is no ambiguity to this provision of the policy, and the intent is obvious. If during an arrest or during an attempted escape by a person under arrest, it is necessary to physically assault the person, then there should be coverage, and the policy so provides; but there should not be coverage in an instance such as occurred when Sheriff Whitman assaulted Reverend Mack W. Ford. Reverend Ford was not being arrested nor was he attempting to escape. He had been summoned to the Bienville Parish Courthouse in connection with the posting of an appearance bond and, while there, was called into the Sheriff's office, where the Sheriff at first verbally reprimanded him for calling the Sheriff a bad name during a previous election and then hit him about the face three times. These actions had nothing whatsoever to do with the duties of Sheriff Whitman as the Sheriff of Bienville Parish.

It is almost beyond comprehension how the lower Court could hold that Sheriff Whitman had coverage under the policy due to the "deprivation of rights" coverage, which was extended in the same sentence that specifically qualified coverage for "assault and battery" as limited therein. We submit that deprivation of rights would include countless things, such as depriving a prisoner of sanitary living conditions, the right to worship, proper

medical care or access to a legal library. Sheriff Whitman did not deprive Mack W. Ford of his rights within the intendment of the insuring contract.

It must be kept foremost in mind that the legal issue before the Court is not a question of the construction and/or interpretation of 42 U.S.C.A. § 1983. §1983 is rightfully given a liberal construction inasmuch as it is remedial legislation. *Basista v. Weir,* (CA 3), 340 F.2d 74.

We are not here attempting to evaluate the conduct of Sheriff Whitman to see if it actually gave Reverend Ford a §1983 action. We are here today construing an insurance contract, which is a question of Louisiana law.

The Louisiana authorities cited hereinabove clearly and without question give North River Insurance Company the right to restrict its contract of insurance coverage so long as it is not contrary to public policy or is in conflict with a statute. The Louisiana Courts mandate that the construction of an insurance contract *must* take into consideration the intent of the parties.

If it had been within the intendment of the parties to insure Sheriff Whitman against damages resulting from the commission of the act in question, why would it have been necessary to even mention assault and battery in the contract of insurance? If deprivation of rights covers everything done by a Sheriff in his capacity as such, then why go the trouble of spelling out numerous things that

are included within "personal injury"? If Sheriff Whitman was to be insured against liability for the act committed, then why could not North River Insurance Company merely have stated "personal injury means damages resulting from anything done by the Sheriff in his capacity as such".

In the U.S. District Court and the Court of Appeals below, plaintiff cited *Thomas v. Appalachian Insurance Company*, 335 So2d 789. This case has absolutely no applicability to the case at bar.

In the *Thomas* case, Chester L. Parson filed suit against State Trooper Dick Thomas and alleged that Thomas "knowingly, intentionally, and maliciously" *used unnecessary and unreasonable force in unlawfully arresting plaintiff* for driving while intoxicated and driving with a suspended license. Appalachian Insurance Company, the general liability insurer for the State Trooper, took the position that, among other things, they did not owe a defense because intentional acts were excluded by the language of the policy. The Court examined the Appalachian policy and, at 315 So2d 791, quoted the usual insuring language whereby the insurer agreed to pay on behalf of the insured sums he would be required to pay as damages "because of...bodily injury...caused by an occurrence and arising out of operations in performance of official duties". Appalachian took the position that the incident involving Chestser L. Parson was not an "occurrence" as used in Coverages A and B because it was not an

accident but an intentional act. The Trial Judge, in dismissing the suit for a declaratory judgment filed by Thomas, held that the allegations of the petition indicated that the alleged acts were intentional and that would not constitute an occurrence within the definition of the policy and there was no coverage.

The Court of Appeal disagreed and relied on Coverage C, which was not mentioned by the Trial Judge. The Court of Appeal cited certain language from the Appalachian policy as follows:

> "Subject to the terms, conditions and limitations hereinafter mentioned, [Appalachian agrees] to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of claims for *false arrest, assault and battery...*or *other claims growing out of the performance of the duties of law enforcement officers or their employees,* during the currency (sic) period of this policy." (Emphasis by the Court)

THE LANGUAGE OF THE APPALACHIAN POLICY IS DIFFERENT THAN THE POLICY UNDER CONSIDERATION!!

The Court of Appeal then held that plaintiff's claim is one growing out of the performance of duties as a law enforcement officer. This language is entirely different. The facts of the *Thomas* case are different. In the *Appalachian* case, the policy clearly encompassed assault and battery, as well as any claim arising out of the performance of the

duties of a law enforcement officer. The assault and battery coverage *was not limited* to any extent whatsoever, while the assault and battery coverage in the instant case is definitely limited, as mentioned hereinabove.

To compare the facts and the policy language in the *Thomas v. Appalachian Insurance Company* case to the instant case is, we respectfully submit, the same as comparing oranges to apples. They are just not the same. The two cases are admittedly somewhat similar, but the *Thomas* case is not and should not be a basis for a ruling in favor of Sheriff Whitman on the question of coverage before the Court.

CONCLUSION

The failure of the Court of Appeals below to reverse the judgment wherein the District Court in effect re-wrote the policy of Insurance issued to Sheriff Whitman contravenes well established Louisiana doctrine concerning the interpretation of insurance policies. We respectfully submit that the Trial Court and the Appellate Court were in error and therefore request that a writ of certiorari should be granted.

Respectfully submitted,
MAYER, SMITH & ROBERTS

By _____
Charles L. Mayer
1700 Buckner Square, Suite 240
Shreveport, Louisiana 71101